TAY KIAN HOCK

v.

KEWANGAN BERSATU BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D5-22-340-1996]
28 AUGUST 2002

TORT: *Conversion - Ingredients - Repossession of goods under hire-purchase - Wrong item repossessed under genuine mistake - Whether liable for conversion - Defence of ex turpi causa non oritur actio - Applicability*

The plaintiff sued the defendant for conversion when the latter, under the guise of repossessing woodworking equipments it had let out to one JL Teknik Sdn Bhd ('JL Teknik'), had taken away a spray pump belonging to the plaintiff. The facts showed however that the plaintiff and JL Teknik were partners in a woodworking business, that the defendant had repossessed the plaintiff's spray pump under the *bona fide* but mistaken belief that it was the pump it had let out to JL Teknik, that the defendant's spray pump at the material time was hidden at JL Teknik's woodworking factory and that, during the trial, the plaintiff on his own motion had produced the defendant's spray pump into court. Upon the obtaining facts, before the learned judge herein, questions arose as to whether the defendant was guilty of conversion of the spray pump, and if so, whether it could avail itself in the circumstances of the defence of *ex turpi causa non oritur actio.*

Held:

[1] In taking the spray pump out of the plaintiff's possession and assuming ownership over it the defendant had committed an act of conversion of the plaintiff's property. However, there is a jurisprudential aspect in this case, which provides the defendant with a good defence. (p 986 f-g)

[2] As a partner of JL Teknik at the initial stage and later having taken and operated its entire business, the plaintiff was duty bound to produce and hand over to the defendant, at the time of repossession, all the items of equipment that the latter had let out to JL Teknik including the spray pump in question. In failing to do so the plaintiff had in fact perpetrated the conversion of his own property when the defendant repossessed an almost identical one that belonged to him. The plaintiff's conduct in perpetrating the conversion had availed the defendant of the defence of *ex turpi causa non oritur actio.* (p 989 g-h)

[3] The availability of the *ex turpi doctrine* as an effective defence lies in the rationale that the plaintiff's conduct and its direct connection with the alleged tortious act make it contrary to public policy to afford a remedy to the plaintiff. In the event, for the defence to succeed, the defendant must establish two ingredients, namely: (a) that the plaintiff's conduct is so clearly reprehensible as to justify its condemnation by the court; and (b) that the conduct is so much a part of the claim against the defendant as to justify refusing any remedy to the plaintiff. (pp 990 g-h & 993 h)

[4] The conversion here was perpetrated by the plaintiff himself. Had the pump been unhidden and available for repossession at the place that it was supposed to be kept, the defendant would have repossessed it without much of a hassle. Having taken the business of JL Teknik together with its equipment the plaintiff was duty bound to keep it under his custody and to hand the same over to the defendant's appointed repossessors. The plaintiff's conduct is so reprehensible as to justify its condemnation by the court. The conduct also formed so much an integral part of the conversion that it would be wholly against public conscience to allow the plaintiff to succeed. (p 995 e-f)

[Plaintiff's claim dismissed.]

Case(s) referred to:

Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd) & Anor v. Government of Malaysia [1994] 1 CLJ 321 SC ***(refd)***
Euro-Diam Ltd v. Barthurst [1990] QB 1 ***(refd)***
Kirkham v. Chief Constable of Greater Manchester Police [1990] 2 QB 283 ***(refd)***
Murphy v. Culhane [1976] 3 All ER 533 ***(refd)***
Pitts v. Hunt [1991] 1 QB 24 ***(refd)***
Saunders v. Edwards [1987] 1 WLR 1116 ***(refd)***
Scott v. Brown Doering McNab & Co [1892] 2 QB 724 ***(refd)***
Tay Lye Seng & Anor v. Nazori Teh & Anor [1998] 3 CLJ 466 CA ***(refd)***
Thackwell v. Barclays Bank plc [1986] 1 All ER 676 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 153

Other source(s) referred to:

Torts, Clerk & Lindsell, 17th edn, para 3-05

For the plaintiff - Balvinder Singh; M/s Sri Ram & Co
For the defendant - Abdul Rahim Hadi (Faizal Hassan Abdul Hamid & Norfiza Mohd Noor); M/s Edlin Ghazaly & Rahim

Reported by WA Sharif

JUDGMENT

Kang Hwee Gee J:

The plaintiff claims against the defendant the conversion of a spray pump, which the defendant had wrongly repossessed from his woodworking factory in consequence of which he suffered loss and damages as follows:

a) the sum of RM1,890 being replacement cost of the alleged converted item;

b) losses suffered in the sum of USD75,180 for the unfulfilled contract with Green Corporation of Tokyo, and in the sum of RM170,000 for the unfulfilled contract with Turning Point Industries Sdn. Bhd., both arising out of the unavailability of the pump for use at his factory and,

c) general damages.

The trial was initially conducted before Steve Shim J (as he then was) before whom all the witnesses for the plaintiff and the first witness for the defendant had already been examined when His Lordship left on being elevated to the higher office of Chief Judge Borneo. In order that the case may be expeditiously disposed of, the parties agreed that the succeeding judge continue the trial.

The defendant, Kewangan Bersatu Berhad, had let out some items of furniture making equipment on hire-purchase to a company called JL Teknik Sdn. Bhd. Among them was a Spray Pump described and identified in the hire-purchase agreement only by its serial number, K90H-PN203-83. Under the hire-purchase agreement the equipment was to be kept at the company's factory at JL Teknik's factory at Lot 1434 Jalan Sungai Jati, Kelang 41000, Selangor.

In time JL Teknik fell into arrears of its monthly repayments whereupon it became necessary for the defendant to repossess the equipment. They were duly recovered from the factory save for the Spray Pump, which could not be found on the said premises.

Subsequently after a search, an almost similar pump was found by an employee of the defendant, Jalil bin Ahmad, at Factory No. 1. whose sole proprietor was the plaintiff operating under the style of Hock Yen Company. He was in the same woodworking business as JL Teknik.

Convinced that the equipment was the very pump that had been let out to JL Teknik, Jalil proceeded to repossess it notwithstanding that it did not carry the serial number of the apparatus as stated in the hire-purchase agreement.

Four days after the repossession on 12 April 1996, the plaintiff through his solicitors demanded the return of the said spray pump from the defendant but to no avail. After several exchange of letters between the parties, it became clear that the defendant would not return the pump to the plaintiff. It insisted that the pump it repossessed was the same one that it had let out to JL Teknik and was therefore its property.

In the course of the trial the plaintiff voluntarily produced a spray pump in court which he claimed to have recovered later from factory No. 2 and which he believed could have been the equipment that was let out that should have been repossessed by the defendant. He was able to say so by looking at a photograph exhibited in an affidavit filed by the defendant showing the defendant's spray pump.

Essentially the tort involves interference with the property of another with the intention of exercising dominion over it. Thus a person who receives or takes possession of another's goods without his authority with the intention of asserting some right or dominion over them in a manner inconsistent with his right of ownership is *prima facie* guilty of conversion.

In the instant case the tort would have been committed if it is proved that pump was the property of the plaintiff and had been wrongfully taken away from his lawful possession by the defendant who had refused to return it despite having been served with the notice.

That the pump was taken from the factory of the plaintiff is not in dispute. What is in dispute is whether it was the pump that the defendant had let to JL Teknik under hire-purchase.

The defendant's insistence that it had repossessed the very item it had let to JL Teknik forms the core of its defence. The defence is also relying on the doctrine of estoppel, which it was submitted, operates to deny the plaintiff of his claim by reason that he was the alter ego of JL Teknik. That defence however appears to be somewhat unclear and misconceived for reasons, which will be clear later.

Having heard the evidence of witnesses called by the parties I can conclude with certainty that the pump repossessed by the defendant was not the one that was let out to JL Teknik and was therefore not its property. I am more than convinced that the defendant had repossessed the wrong pump.

To arrive at this finding, I need only to consider the testimony of the defendant's own witness Daniel Goh, the Managing Director of Chin Goh Sdn. Bhd. the person who supplied the spray pump to the defendant. He had been in the business of supplying woodworking equipment to factories since 1979.

After comparing the pump repossessed by the defendant (exh. D43(a)) with the pump produced by the plaintiff (exh. D43(b)), he was able to say with exactitude that the pump he supplied to the defendant was of the "spray tank" type whereas the one that was repossessed was of "spray pump" type. The "spray tank" type derives its paint supply from a paint tank attached directly under it whereas, the "spray pump" type has no such tank, deriving its paint supply from a can instead.

He was also able to confirm from the pre-purchase quotation he supplied to JL Teknik, that the pump would bear the serial No. K90H-PN20383 which was to be found at the tank portion of the pump. The serial number of the pump produced by the plaintiff could not now be read as its tank was now missing having been detached from the unit. His evidence therefore confirms that the repossessed pump being NOT of the "spray tank" variety, could not have been the one let out by the defendant to JL Teknik.

That the repossessed pump was the property of the plaintiff is clear from the evidence of the salesman of Dynaflo Sdn. Bhd., Bazeir bin Abd Samad. I would accept as true and accurate his testimony that he had sold the very pump to the plaintiff sometime in 1995. He had been in the business of selling such a pump for more than 13 years and was able to tell from observation alone that the pump that was repossessed was of the type that his company had sold to the plaintiff. The apparatus, he explained did not carry any specific serial number as it was assembled from parts, each of which had its own part number.

If that was all to the plaintiff's case he would have succeeded – for it is clear that in taking the pump out of his possession and assuming ownership over it the defendant had committed an act of conversion of the plaintiff's property. The defence that the plaintiff was the alter ego of JL Teknik and was estopped from making a claim in conversion does not make sense and requires no further deliberation. This is so because the defendant cannot escape liability if it had wrongly repossessed a spray pump that was the personal property of the plaintiff whatever personality he may have assumed.

But there is a jurisprudential aspect of the case, which in my view provides the defendant with a good defence. This will become clear after the evidence of a crucial witness called by the defendant, Liew Seng Nam, is considered.

Liew Seng Nam gave evidence that he and his wife were directors of JL Teknik whose business was mainly providing general consultancy. The plaintiff was a partner of JL Teknik. They had decided to enter the rubber woodworking business using the JL Teknik's premises on Lot 1434 Jalan Sungai Jati, Kelang 41000 sometime in early 1994.

The plaintiff did not hold any shares in the company but had an indirect interest therein. They had an understanding whereby they would use JL Teknik to obtain loans and hire-purchase financing. They had planned to enter into negotiation on their respective shareholding in the business only after the factory was well set up.

Consequently, the equipment for use at the factory was secured by JL Teknik which entered into the hire-purchase agreement with KUBB, the defendant. According to Liew, it was the plaintiff who arranged for the hire-purchase of the equipment from the defendant. He and his wife only went to KUBB's office to sign the hire-purchase agreement both as directors on behalf of the company as well as in their personal capacity as guarantors. The plaintiff himself had also arranged for the delivery of the equipment to the factory. The factory itself had been managed by the plaintiff from the moment it started production.

Liew remained with the factory for less than a month after production started. He decided to leave the business at the factory when in late 1994 he secured a contract to build a golf course at Bukit Tinggi. He then worked out an arrangement with the plaintiff on an oral basis whereby he transferred the whole business at the factory to the plaintiff on condition that the latter continued with the monthly installment repayments of the hire-purchase of the equipment with the defendant and bore all the expenses of running the factory.

There were only two factories on Lot 1434 when he left. JL Teknik occupied one of them. All the machines hired from the defendant were there in that factory. A metal fabrication factory occupied the other factory.

The plaintiff's account was different. He said that at the time when the defendant came to repossess the machines he was occupying both Factory 1 and Factory 2 on Lot 1434. He had rented Lot 1434 from two persons called Ah Hua and a Mr.Tee. JL Teknik had been his sub-tenant and was occupying Factory 2. It was in the business of making wooden pallets. At the time when the defendant went to repossess their equipment JL Teknik was no longer in existence.

When cross-examined he said he had no relationship with JL Teknik. He also denied that he had taken over possession of its premises and its goods and was operating the factory using its machines.

In the course of his submission counsel for the plaintiff had urged me to disregard the evidence of Liew Seng Nam as the plaintiff was not cross-examined with respect to his relationship with Liew and was therefore taken by surprise.

The notes in the book of Steve Shim J on the cross-examination of the plaintiff by counsel for the defendant, Encik Rahim, discloses as follows:

Encik Rahim: Have you heard of a company called JL Teknik Sdn. Bhd.?

PW1 : Yes.

Encik Rahim: What do they do?

PW1 : Manufacture of wooden pallets for holding purposes.

And at p. 36 of the notes:

Encik Rahim: I refer you to pages 38 and 39 – see paragraph 2(a) (he reads) why use the word "irrelevant"?

PW1 : Because I had nothing to do with JL Teknik.

Encik Rahim: Were you not in possession of JL Teknik's premises and goods and operated your business using JL Teknik machines?

PW1 : No.

The plaintiff's denial that he had any relationship with JL Teknik or that he was in possession of its premises and using its machines, provides the legitimacy for the defendant to adduce rebuttal evidence to prove otherwise. The rebuttal evidence, it is clear, would not contravene what is commonly known as the finality rule under s. 153 of the Evidence Act 1950 as its purpose was not to discredit the witness but to prove a fact in issue – that is to say, whether there was such a business relationship between him and JL Teknik. Admittedly, the cross-examination was brief and abrupt. But having obtained an unqualified denial from the plaintiff, the counsel for the defendant was at liberty not to engage in any further questioning. The plaintiff was free to correct or to qualify his testimony on this point on re-examination by his own counsel if necessary.

The testimony of Liew Seng Nam in my view proves beyond a moral certainty that the plaintiff was, as counsel for the defendant put it, an alter ego of JL Teknik.

I accept Liew as a witness of truth and would give due credence to his testimony that the plaintiff was a partner of JL Teknik when it began business at Factory 2 and that the business was left over to him when Liew left to attend to his golf course contract barely a month after the factory was in production. His testimony was consistent with the testimony of Mohd Ali Shahbuddin b. Nayan, the defendant's marketing and credit officer, that the plaintiff was involved *ab initio* with the business of JL Teknik, that when he visited Lot 1434 to inspect the equipment when JL Teknik's hire-purchase application was being processed, the plaintiff was there.

It was also consistent with the testimony of Abdul Jalil bin Ahmad, the defendant's credit officer, that,

(i) when he visited Lot 1434 sometime in March 1995, he was taken on a factory visit by the plaintiff himself and the factory visit had covered both Factory 1 and Factory 2 where he saw for himself that activities were being carried out concurrently at both areas of the premises;

(ii) when he visited Lot 1434 sometime in November the same year to collect default payment from JL Teknik he was again met by the plaintiff who had assured payment when he has the money and PW1 further represented to DW2 that he was the supervisor of JL Teknik;

(iii) on the day of the repossession, ie, 8 April 1996 he saw workers moving freely between the two premises of Lot 1434;

(iv) during the various visits that he made to Lot 1434 before the repossession, he was met by the plaintiff who represented himself to him as JL Teknik's supervisor and,

(v) in particular, when he visited the premises of JL Teknik sometime in November 1995, the plaintiff himself had made promises to him to pay for the outstanding installment payments owed by JL Teknik.

On the other hand, the plaintiff's claim that JL Teknik was merely his sub-tenant whose tenancy had ended before 8 April 1996, the day of repossession, is inconsistent with the fact that the other items of equipment repossessed by the defendant were found at the factory.

Further, the issuance of the two cheques of RM4,163 each (exh. 42(a) and (b)) from the account of his own firm Hock Yen and signed by him personally to pay for two outstanding installments in respect of the hire-purchase flies in the face of his denial of having nothing to do with the company. It provides instead, an unassailable corroborative evidence of his relationship with JL Teknik.

As a partner of JL Teknik at the initial stage and later having taken over and operated its entire business the plaintiff was dutybound to produce and to hand over to the defendant all the items of equipment that it had let out to JL Teknik including the spray pump at the time of repossession. In failing to do so the plaintiff had in fact perpetrated the conversion of his own property when the defendant repossessed an almost identical one that belonged to him.

The conduct of the plaintiff in perpetrating the conversion in my view avails the defendant of the defence of *ex turpi causa non oritur actio* (no cause of action arises from a base cause), the jurisprudential aspect of the case referred to earlier.

The doctrine is fairly well established at common law. The principle is described by Lindley LJ in *Scott v. Brown Doering McNab & Co* [1892] 2 QB 724 at 728 as follows:

> *Ex turpi causa non oritur actio.* This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality.
>
> It matters not whether the defendant has pleaded the illegality or not. If the evidence is adduced by the plaintiff proves the illegality the Court ought not to assist it. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v. Johnson* [1775] 1 Cowp 341.

As Lindley LJ indicated, the doctrine had its heritage in contract. But it is equally well developed in tort. As Lord Denning MR said in *Murphy v. Culhane* [1976] 3 All ER 533, in an appeal involving a claim by the widow a deceased whose death was brought about in an affray which he himself had initiated:

> … Suppose a burglar breaks into a house and the householder finding him there, picks up a gun and shoots him, using more force maybe than is reasonably necessary. The householder may be guilty of manslaughter and liable to be brought before the criminal courts. But I doubt very much whether the burglar's widow could have an action for damages. The householder might well have a defence either on grounds of *ex turpi causa non oritur actio* or *volenti non fit injuria*. So in the present case it is open to Mr. Culhane (the defendant) to raise both these defences. Such defences would go to the whole claim.

The availability of the doctrine as an effective defence in appropriate cases lies in the rationale that the plaintiff's conduct and its direct connection with the allegedly tortious act make it contrary to public policy to afford a remedy to the plaintiff. As Kerr LJ said in *Euro-Diam Ltd v. Barthurst* [1990] QB 1 at 35:

> The *ex turpi causa* defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts …

In *Pitts v. Hunt* [1991] 1 QB 24, the plaintiff suffered a serious injury in a motor cycle accident while riding pillion with the rider. The rider of the motor cycle was killed when he collided with another vehicle. The plaintiff brought an action in negligence against the personal representative of the rider and the driver of the vehicle. Prior to the accident the plaintiff and the rider had been drinking heavily. He was fully aware that the rider was uninsured and did not hold a licence to ride the motor cycle. He had also actively and forcefully encouraged the rider to drive in a reckless and dangerous manner.

The Court of Appeal in upholding the judgment of Judge Fallon QC of the Queen's Bench held, (per Dillon LJ) that since the plaintiff's action arose directly *ex turpi causa* and not from his having suffered a genuine wrong to which the unlawful conduct was incidental and, (per Beldam LJ) that having regard to the conduct of the plaintiff who had actively encouraged the motor cycle rider to commit offences (which, if the death of a third party had occurred, would have amounted to manslaughter) and having regard to public policy, particularly the policy underlying the Road Traffic Acts, the plaintiff's claim against the estate of the deceased rider and the driver of the other vehicle would be disallowed.

But in *Kirkham v. Chief Constable of Greater Manchester Police* [1990] 2 QB 283 the reasoning was different. In that case the widow of a deceased prisoner sued the police authorities for negligence in failing to inform the prison authorities of the deceased's suicidal tendencies which they were fully aware of. While confirming that a defence of illegality can be pleaded in tort, the court allowed the claim – this notwithstanding that the deceased had committed suicide. It held the view that suicide does not today amount to a conduct so intrinsically immoral that a claim arising out of suicide or attempted suicide must automatically be refused.

And in *Saunders v. Edwards* [1987] 1 WLR 1116, the plaintiff was able to recover damages for fraud even though the contract for the sale of a flat on which it was based contained a false valuation to escape stamp duty. It was held that his own fraud on the Inland Revenue was independent of, and unconnected to, the fraud practised on him.

The doctrine is well established in our jurisdiction although it would appear to have been applied mainly to cases involving claims for damages where the legitimacy of the claimant's livelihood is in dispute as in *Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd) & Anor v. Government of Malaysia* [1994] 1 CLJ 321. In that case the deceased who was driving an illegal taxi was killed in a motor accident. The Supreme Court had to decide whether his administrator can legally claim the loss of earning of RM1,500 per month which he earned from the operation of the illegal taxi. After reviewing a number of authorities Peh Swee Chin SCJ, ruled at p. 325 as follows:

> We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy. We think that we would also follow, on this point, the decisions of *Ooi Han Sun; Burns; Lebagge* and *Dhlamini* and approve the dictum in question in *Yaakub*. We therefore uphold the decision of the learned judge in the court below and that of the learned registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operations of the taxi should be disallowed; because *ex turpi causa non oritur actio* or, in other words, such claim would be against public policy. We would like to emphasise the timely caution of the learned Chief Justice of Singapore in *Ooi*, that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.
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> We have in deciding so, considered as to whether we should make a distinction between income earned from a very minor transgression of law, such as that as revealed by the facts in the instant appeal and those cases of unlicensed hawking on the one hand, and those serious crimes like drug trafficking and armed robbery on the other hand. Such distinction in reality turns on the question of degree of criminality of conduct. Such degree will not alter the basic nature of criminality of such conduct. There are other reasons also for disregarding such distinction. There is the great practical difficulty as to when to draw the line between such minor offences and the more serious ones. To attempt to do so would certainly lead to a good deal of confusion and uncertainties, a situation much dreaded by all. To attempt to do so is like trying to distinguish between offences against the rights established by God and those against rights established by man. It is an irrelevant exercise at the present time.
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> We have realised, of course, that in any case when the claim for dependency is solely based on income earned from an illegal activity, the dependants, though completely innocent of the illegality, will suffer an injustice and the tortfeasor, will obtain an undeserving windfall. The dependants' interests are thus seen to be irreconcilable with the interests of the law; the latter are, to provide certainty of the law but yet give rise to an injustice in such a situation.

> The interests of the law are beyond providing merely certainty of the law. They are also to protect society from illegal activities which, if allowed to pass without judicial castigation, would encourage such illegal activities, and allow the perpetrators to set an example to fellow citizens to regard such illegal activities with tolerance and a desire to follow the same. The insidious consequences are not hard to imagine. With religion losing its grip on significant numbers of society, the interests of law in this sense would have to be rigorously upheld. We therefore are of the opinion that such personal interests of such dependants or other claimants would have to be sacrificed for the greater interests of the law.

In the more recent Court of Appeal case of *Tay Lye Seng & Anor v. Nazori bin Teh & Anor* [1998] 3 CLJ 466, the question that the court had to decide was whether the respondent's claim for loss of earning should be disallowed on the ground that he was at the time of the accident working illegally with an expired work permit in Singapore. Distinguishing *Chua Kim Suan, supra,* and after referring to a number of Australian, New Zealand and Singapore cases, this was what Siti Norma Yaakob JCA speaking for the panel said at p. 474:

> Reverting to the circumstances of our instant appeal, we consider that the fact that the first respondent had no valid work permit, *per se*, cannot affect his claim for loss of earnings in Singapore. This is so as unlike *Chua*'s case, the first respondent was working legally in Singapore initially. He had a valid work permit issued by the Singapore authorities but unfortunately that expired four months before the accident. We have been told that the obligation to renew the work permit lies squarely with the first respondent's employer and since there is no evidence that they had done so, we consider that the first respondent had not been culpably responsible for the predicament that he had found himself to be in. Under these circumstances, we consider that the maxim *ex turpi causa non oritur actio* lacked moral justification and to that end is not applicable to the instant appeal before us.

Authorities do show some inconsistency with respect to the application of the principle due to the broad and imprecise test of what conduct would be an affront and what would not to public moral. Nevertheless, the editors of the 17th edn of Clerk and Lindsell on *Torts* after reviewing a number of relevant English cases, (at para. 3-05), are able to conclude that for the defence of *ex turpi* to succeed in tort the defendant must establish:

(a) that the plaintiff's conduct is so clearly reprehensible as to justify its condemnation by the court, and,

(b) that the conduct is so much a part of the claim against the defendant as to justify refusing any remedy to the plaintiff.

On my part I would accept that proposition as the broad test that should be applied in determining whether the plaintiff in the instant case should be allowed to succeed. Indeed, a similar approach appears to have been adopted by Hutchison J in *Thackwell v. Barclays Bank plc* [1986] 1 All ER 676 which fortunately bears some causal similarity to the instant case.

In that case, a Mr. Thackwell, the plaintiff, had colluded with a director of a company Mr. Sawford to obtain a hire-purchase financing from a finance company called Lombard North Central Ltd., on two items of plant machinery to be purchased from Mr. Thackwell himself. The value of one of the items was grossly inflated while the other item did not exist. The transaction was laundered through a company called Allan Jones (Plants Sales) & Co. Ltd. under which the plaintiff would sell the two items of plant to the company who would then obtain the hire-purchase financing from the finance company. After the financing was obtained from the finance company, Allan Jones then issued a cheque for payment of the two items payable to the plaintiff. Mr. Sawford intercepted the cheque before it could be handed over to the plaintiff. He then fraudulently diverted the cheque to his own company's account with the defendant bank, by falsely representing to the bank manager that the plaintiff had endorsed the cheque for payment to his company. The bank manager acted on the representation without due diligence and accordingly wrongfully credited the plaintiff's cheque into Mr. Sawford's company account. The plaintiff sued the bank in negligence and conversion, but failed in both.

In respect of the action on conversion this was what Hutchison J said when he accepted the submission of the defendant's counsel at p. 687h of his judgment:

> Counsel for the defendants, citing the well-known passage from the speech of Lord Wilberforce in *Anns v. Merton London Borough* [1977] 2 All ER 492 at 498-499, AC 728 at 751-752, argues by analogy that the first stage of the inquiry is to look at the proximity of the illegal conduct relied on to the claim maintained by the plaintiff, and that the court has next to consider whether there are other considerations which as a matter of public policy ought to affect the plaintiff's right to recover. He submits that there is an abundance of modern authority which demonstrates that, approaching the matter essentially in this way, the courts will deny recovery to the plaintiff even where he does not have to rely on an illegal transaction to found his cause of action, because the attitude of the courts has been to preclude a plaintiff from benefiting from the proceeds of a serious crime, whether or not he was implicated in it.

And in disallowing the plaintiff's claim he justified his decision at p. 689 of his judgment:

> I have, of course already held that Mr. Thackwell was a party to the fraudulent refinancing transaction, in the sense that he knew from the outset that it was a fraud and willingly participated in it. Accordingly, it follows on the basis of counsel's concession that he cannot maintain this action against the bank in conversion. However, in case that conclusion is open to challenge, I should state that, even had I found Mr. Thackwell was innocent and that Mr. Sawford alone was the perpetrator of the fraudulent refinancing transaction, I should have denied Mr. Thackwell recovery. This is because I accept the correctness of the arguments advanced by counsel for the defendants and adopting his approach, it seems to me first that it would indeed be difficult to find a case in which the criminal conduct relied on was more proximate, because, as counsel for the defendants submits, the cheque alleged to have been converted constituted in reality the very proceeds of the fraudulent conduct. I say this notwithstanding that I recognise that it was not Lombard's cheque but the cheques drawn by Allan Jones once he had received Lombard's cheque. If one then considers the second of the suggested tests, everything points in my judgment to a denial, on grounds of public policy, of the right to recover. The underlying crime was a serious one and there is nothing inherently unfair in a result which deprives Mr. Thackwell of the proceeds of this cheque. On the contrary, by permitting Mr. Thackwell to recover the proceeds of this cheque from the bank should as it seems to me, be indirectly assisting in the commission of a crime.

To return to the issue in the instant case.

I am apt to find for reasons adverted to earlier, that the conversion was perpetrated by the plaintiff himself. Had the pump been unhidden and available for repossession at the place that it was supposed to be kept, that is to say at the factory of JL Teknik, the defendant would have repossessed it without so much of a hassle. Having taken over the business of JL Teknik together with its equipment the plaintiff was dutybound to keep it under his custody and to hand it over to the defendant's appointed repossessors. The plaintiff's conduct, I am more than convinced is so reprehensible as to justify its condemnation by the court. That conduct formed so much an integral part of the conversion that it would be wholly against public conscience to allow the plaintiff to succeed.

Needless to say, the defence of *ex turpi causa* would not be available to the defendant, if in taking possession of the pump the defendant had not acted in the *bona fide* belief that it had taken possession of its own property – if for instance, the defendant took possession of that pump merely to hold the plaintiff to ransom in order to induce him to produce the actual pump – for in such a case it could no longer be said that the plaintiff had perpetrated the conversion.

Having considered the testimonies of witnesses of both the parties, particularly the experts with respect to the description of the pump and having observed the two units of pumps that were produced before the court, I am convinced however that the repossession of the plaintiff's pump was a *bona fide* mistake on the part of the defendant. The two pumps were almost identical both in size and form that it would be difficult to distinguish one from the other. The consideration would be different had the plaintiff produced or made available to the defendant the correct pump at the time of repossession or at the very least informed the defendant of its existence to allow the defendant the opportunity to make a more rational decision. It is true the pump repossessed by the defendant had a different serial number from the one let out to JL Teknik. But serial number alone which could be tampered with, need not be the only criteria for identification. Given that it was the only spray pump resembling the one that was let out that could be found at Lot 1434 at the time of repossession, it was all the more likely that a genuine mistake had been made.

The plaintiff's claim is dismissed with cost.